

COURT OF APPEAL FOR ONTARIO

CITATION: Faichney (Re), 2022 ONCA 300

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Fairburn A.C.J.O., Gillese and Paciocco JJ.A.

IN THE MATTER OF: James Faichney

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Suzan E. Fraser, for the appellant

Dena Bonnet, for the respondent, Attorney General of Ontario

Michele Warner, for the respondent, Person in Charge of the Centre for Addiction and Mental Health

Heard: February 11, 2022 by video conference

On appeal from the disposition of the Ontario Review Board, dated June 15, 2021, with reasons dated July 7, 2021.

Paciocco J.A.:

OVERVIEW

[1] James Faichney is a 52-year-old Indigenous man. On September 16, 1999, while transient and homeless, he attended a church looking for food. There, he assaulted an 84-year-old night supervisor, injuring him. It was a serious attack and led to a charge of assault causing bodily harm contrary to the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. On November 9, 1999, he was found not criminally

responsible on account of mental disorder (“NCR”). He has been under the jurisdiction of the Ontario Review Board (“ORB”) since that time.

[2] In the decade following the NCR verdict, Mr. Faichney was detained at a series of forensic psychiatric institutions before being moved to the Centre for Addiction and Mental Health (“CAMH”) in March 2011. Since that time, CAMH has been Mr. Faichney’s care provider. Although Mr. Faichney was subject to detention orders until 2019, CAMH has been supervising Mr. Faichney in the community since March 2015. In 2019, Mr. Faichney was granted a conditional discharge with conditions including minimum weekly reporting and residence at a supervised boarding house.

[3] During the June 9, 2021 annual review hearing, CAMH and the Attorney General of Ontario (“AGO”) sought a continuation of the existing order on the basis that Mr. Faichney continued to present a serious threat to public safety but did not require a detention order. Mr. Faichney sought an absolute discharge, arguing that he no longer posed a significant threat to the safety of the public.

[4] On June 15, 2021, the ORB ordered a continuation of the conditional discharge that had been in place. The ORB released its Reasons for Disposition on July 7, 2021.

[5] This is an appeal by Mr. Faichney of that June 15, 2021 disposition order. He argues that the ORB erred by failing to consider a 2011 report filed on his behalf in accordance with *R. v. Gladue*, [1999] 1 S.C.R. 688, and that the ORB failed to

refer to the *Gladue* principles, which are summarized at para. 93 of the *Gladue* decision. He also argues that the ORB's determination that he posed a significant threat to the safety of the public is unreasonable.

[6] I would dismiss Mr. Faichney's appeal. As I will explain below, I do not accept that the ORB failed to consider the 2011 *Gladue* report, nor do I accept that the ORB failed to respect relevant *Gladue* factors. I also conclude that there was ample evidence justifying the ORB's determination that Mr. Faichney posed a significant threat to the safety of the public.

BACKGROUND FACTS

[7] Mr. Faichney is currently 52 years old. He is Anishinaabe with Shawnee and Pottawatomi heritage. As the result of an adoption placement, Mr. Faichney was raised in a non-Indigenous home. He is a tragic casualty of the Sixties Scoop, which saw many Indigenous children being separated from their families and denied their heritage.

[8] At the age of 17, Mr. Faichney left his adoptive home. He ultimately reconnected with his Indigenous family, but sadly, his hardships continued. In June 1996, Mr. Faichney began to receive psychiatric care after displaying psychosis, paranoia and suicidal thoughts. He has struggled with major mental illness since that time. His current diagnoses are schizophrenia, clinically significant trauma history, substance use disorder (in full remission), and personality disorder not otherwise specified.

[9] When not under control, Mr. Faichney's mental illness can cause him to become paranoid and to have grandiose delusions and command hallucinations. He was experiencing such symptoms when he committed the 1999 assault that initially brought him under ORB jurisdiction. On March 28, 2006, while still under the jurisdiction of the ORB, Mr. Faichney was again found to be NCR in connection with another serious assault that he committed in 2005, this time on a co-resident at a mental health facility. Again, this 2005 assault occurred when Mr. Faichney was manifesting paranoia and grandiose delusions. In 2007, while under the delusion that staff members were framing him for murder, Mr. Faichney committed yet another assault, this time on a male staff member, punching and kicking him to the point that he required hospital treatment. To his considerable credit, although since 2007 Mr. Faichney has frequently reported being threatened or offended while under CAMH's care, and has been in situations of conflict, he has not engaged in violence since the 2007 assault, a period now approaching fifteen years.

[10] There is no indication in the record that attention was paid to Mr. Faichney's Indigeneity in the early years after he fell under the ORB's jurisdiction. However, by 2011, hospital records show that Mr. Faichney began to demonstrate interest in receiving culturally appropriate care and there is periodic reference in those records to his attendance at Indigenous community counselling, faith healing sessions and meetings with CAMH Aboriginal Services. Those hospital reports

also record a number of instances in which Mr. Faichney reported experiencing racism within the institution from co-patients and his treatment team.

[11] By the time Mr. Faichney was living in the community, Indigenous agencies were playing a significant part in his life, providing him with support services relating to both his housing and his health. Most significantly, Anishnawbe Health Toronto (“AHT”) was assisting him and continues to assist him. A letter from an AHT social worker, placed into evidence at the June 9, 2021 annual review hearing, confirms that Mr. Faichney has been receiving weekly, if not biweekly support from the AHT social worker for the last three years, and has access to traditional healing services and psychiatric support.

[12] By February 2020, after Mr. Faichney had experienced a long period of stability in the community, the CAMH clinical team began to explore a treatment plan that would provide for his gradual progression to civil psychiatric care in the community, with psychiatric follow-up through AHT. As a result, Mr. Faichney’s reporting hours at CAMH were reduced and in May 2020 he was permitted to take more control over the administration of his medication at his residence. The Reasons for Disposition of the ORB relating to the July 8, 2020 conditional discharge disposition affirmed the objective of withdrawing some of Mr. Faichney’s current levels of support and giving priority to eventually moving his care to AHT while he is under ORB jurisdiction.

[13] During the June 9, 2021 annual review hearing that led to the order that is the subject of this appeal, Mr. Faichney argued that he no longer represents a significant threat to the safety of the public. He maintained that AHT is better able to attend to his mental health needs than CAMH, given the culturally appropriate care provided by AHT, CAMH's acknowledged "legacy as a colonial institution [operating as] part of a system tainted with racism and oppression", and the racism he has personally experienced within CAMH. Simply put, it was Mr. Faichney's position before the ORB that the time has arrived to remove CAMH's support so that his care could be moved to the AHT.

[14] The AGO, with the support of Mr. Faichney's CAMH treatment team, took the position that this change was premature. Supported by the opinion of Dr. Meng, Mr. Faichney's treating physician at CAMH, the AGO argued that Mr. Faichney continued to pose a significant threat to the safety of the public that could not be ameliorated by anything less than a continuation of the conditional discharge disposition on the terms then in place.

[15] During the hearing, the parties did not join issue on the suitability of those terms, but only on whether Mr. Faichney continued to pose a danger to the public.

[16] I will address the material evidence relied upon by each of the parties below when addressing Mr. Faichney's grounds of appeal, but there is one point that warrants immediate mention. In correspondence between Dr. Khan, an AHT

psychiatrist, and Mr. Faichney's Transitional Care Manager at CAMH in January 2021, Dr. Khan said:

We are happy to follow [Mr. Faichney] here regularly once his review board is complete. I don't want the client to get confused about who is providing psychiatric care for him at this time. I'm happy to check in with him once every 3-4 months until he is fully discharged to us. I last saw him in Late Oct, so maybe in late Feb we can check in again.

[17] As indicated, on June 15, 2021, the ORB issued a disposition order imposing a conditional discharge on the same terms as the July 8, 2020 order. In the Reasons for Disposition relating to the June 15, 2021 disposition order, the ORB listed the documentary evidence before it, including the 2011 *Gladue* Report, but the ORB did not otherwise reference the *Gladue* Report in its reasons, nor did it advert specifically to *Gladue* principles. However, as I will explain, the ORB did describe efforts that CAMH had taken to assist Mr. Faichney in receiving culturally appropriate care.

THE ISSUES

[18] Mr. Faichney appeals the June 15, 2021 ORB disposition. He raises several objections to the ORB's decision, but his grounds of appeal fairly resolve into two, which can be expressed as follows:

- A. Did the ORB err by failing to consider and refer to the 2011 *Gladue* report and the *Gladue* principles when concluding that Mr. Faichney remains a significant threat to the safety of the public within the meaning of s. 672.54?

B. Was the “significant threat” finding unreasonable?

[19] As indicated, I would not give effect to either of these grounds of appeal.

ANALYSIS

A. DID THE ORB ERR BY FAILING TO CONSIDER AND REFER TO THE 2011 *GLADUE* REPORT AND THE *GLADUE* PRINCIPLES WHEN CONCLUDING THAT MR. FAICHNEY REMAINS A SIGNIFICANT THREAT TO THE SAFETY OF THE PUBLIC WITHIN THE MEANING OF S. 672.54?

[20] The appellant submits that the Board erred in law when it determined that he was a significant threat to the safety of the public without referring to the *Gladue* Report and principles. He contends that the Board did not address his special circumstances arising from his Indigeneity and that individualized assessment is required by s. 672.54.

[21] The respondent AGO submits that *Gladue* factors are “not pertinent” to the threshold question of significant threat, the only live issue during the disposition hearing. The AGO relies on *Re Sim* (2005), 78 O.R. (3d) 183 for this proposition.

[22] If the AGO’s submission is correct, there is no need to closely consider the ORB decision in resolving this ground of appeal, so it is convenient to address the AGO’s submission at the outset. I do not agree that *Gladue* principles are not pertinent to the threshold question of significant threat. In *Sim*, Sharpe J.A., writing

on behalf of this court, affirmed the importance of the *Gladue* principles to ORB dispositions. He explained how the *Gladue* principles are to be integrated with the analysis set out in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 relating to whether someone poses a “significant threat to the safety of the public” and, if so, what the least onerous and least restrictive disposition is, now described under the legislation as the “necessary and appropriate” disposition.

[23] Specifically, the Supreme Court of Canada affirmed in *Winko* that a review board must take into account the four statutory criteria set out in s. 672.54 of the *Criminal Code*: (1) the need to protect the public from dangerous persons; (2) the mental condition of the accused; (3) the reintegration of the accused into society; and (4) the other needs of the accused: at para. 55. In *Sim*, at paras. 18 and 19, Sharpe J.A. described the impact that the *Gladue* principles would have on each of these four criteria:

When assessing the dangerousness [statutory factor one] or mental condition [statutory factor two] of the accused, it would no doubt be helpful for the ORB to have as full a record as possible. A full record would contain information pertaining to the accused person's background, including aboriginality. However, so far as I am aware, aboriginal status would ordinarily have little direct bearing upon the dangerousness [statutory factor one] or the mental condition [statutory factor two] of the accused. An individual will not be more or less dangerous, nor will an individual be more or less mentally ill, because of his or her aboriginal status.

On the other hand, proper consideration of appropriate placement of the accused, reintegration into society [statutory factor three] and the other needs of the accused [statutory factor four] will call, where the circumstances warrant, for the ORB to advert to the unique circumstances and background of aboriginal NCR accused. Accordingly, the *Gladue* principles should be applied to compliment the analysis that s. 672.54 requires. [Emphasis added.]

[24] It is the emphasized part of para. 18 on which the AGO rests its submissions. However, when the emphasized words are read in context, it is apparent that Sharpe J.A. was not suggesting that *Gladue* principles are not relevant to the question of significant threat. Rather, he was making clear that, when determining whether the NCR accused is a significant threat and, if so, what disposition should be imposed, the mere fact of Indigeneity will not make the person more or less dangerous or more or less mentally ill. Of course, that is as true today as it was when *Sim* was written. To hold otherwise would open the door to dangerous, offensive and manifestly incorrect stereotypes. Therefore, he was not saying that Indigeneity can never be relevant to the significant threat analysis. Rather, *Sim* provides that:

- 1) "*Gladue* principles should be applied to compliment the analysis that s. 672.54 requires": at para. 19;
- 2) That analysis requires the ORB to look at four factors when determining the question of significant risk and least onerous and least restrictive disposition;
and

3) While *Gladue* factors may have less impact on statutory factors one and two (dangerousness and mental condition), and more commonly inform statutory factors three and four (reintegration into society and the other needs of the accused), “it would no doubt be helpful for the ORB to have as full a record as possible” when dealing with these issues: at para. 18.

[25] Accordingly, I do not accept the AGO’s contention that *Sim* held that *Gladue* principles do not apply to the threshold question of whether a person remains a significant threat.

[26] Nor do I accept Mr. Faichney’s submission that the ORB erred in law when it determined that the appellant was a significant threat to the safety of the public without referring to the *Gladue* Report and principles.

[27] As a preliminary matter, it must be borne in mind that the ORB’s reasons must be read contextually. That context includes the evidence before the ORB that I refer to above confirming that CAMH has done much in the last several years to support the appellant’s Indigeneity. His forensic care team has encouraged and facilitated AHT’s provision of services to him and CAMH has proposed a shared model of care while the appellant transitions to AHT. As I will explain, the Reasons for Disposition reveal that the ORB was fully alive to this, and to the barriers that remained in fully transitioning Mr. Faichney to culturally appropriate care.

[28] Moreover, as the AGO correctly pointed out, the sufficiency of the direct attention the ORB gave to Mr. Faichney’s Indigeneity and to the *Gladue* principles

cannot be assessed without close attention to what was at issue during the disposition hearing. Quite simply, given the live issues at the disposition hearing, extensive explicit reference to the *Gladue* principles was not required.

[29] Specifically, no issue was taken before the ORB relating to the conditions that would be included in the disposition, nor were there live issues relating to how best to achieve rehabilitation or restorative justice through a disposition. There was therefore no need for the ORB to address the impact that *Gladue* principles would have on Mr. Faichney's rehabilitation or prospects for restorative justice, since those questions were not in issue. Nor was the suggestion made that systemic discrimination or Mr. Faichney's background experiences as an Indigenous person would have had any relevance in identifying the nature and intensity of his mental condition. The only live issue at the hearing was whether Mr. Faichney continued to pose a significant threat to public safety. The relevance his Indigeneity had before the ORB at the June 9, 2021 annual review was therefore confined to its impact on whether he posed a danger to the public.

[30] In that regard Mr. Faichney argued, in effect, that his relationship with AHT, with its culturally appropriate treatment, was an important consideration in deciding whether he would pose a threat to the safety of the public. His position was that his access to this culturally appropriate treatment at AHT reduced the risk that he would fall away from treatment in the community, including medication, which is

required to stabilize his condition and prevent the kind of deterioration that could create a danger to public safety.

[31] Although the ORB did not reference the 2011 *Gladue* report or expressly identify *Gladue* principles when addressing this point, it is clear that the ORB fully appreciated and addressed this submission, finding, as a fact, that AHT “is not able to provide the level of the psychiatric care and case management support currently required by Mr. Faichney. The psychiatrist on staff is only available a few hours per week and provides services to a number of clients.” This finding is a complete answer to the submission that Mr. Faichney could maintain his mental health in the community by taking advantage of the culturally appropriate care provided by AHT.

[32] This dispositive finding is amply supported by the evidence before the ORB. Initially, Mr. Faichney consulted with Dr. Khan, a part-time psychiatrist who was assisting AHT at the time. In her January 7, 2021 correspondence, Dr. Khan explained a five-week delay in responding to Mr. Faichney’s CAMH Transitional Care Manager’s request for information on the basis that she “[hadn’t] been in the office since late November”. She then offered to hold a meeting with Mr. Faichney in late February. Mr. Faichney did not manage to meet with an AHT psychiatrist until March 24, 2021, when he met with Dr. Hunter, who had replaced Dr. Khan. Dr. Hunter also worked at AHT part-time and attended the clinic only once weekly, with a large roster of patients waiting to be seen.

[33] As illustrated below, there was also evidence before the ORB that Mr. Faichney was prone to discontinuing his medication, leading to deterioration in his condition, and that there were issues with his insight into his mental health and his need for community support.

[34] In my view, the Reasons for Disposition relating to the disposition of June 15, 2021 amply explain why the *Gladue* arguments advanced on Mr. Faichney's behalf did not provide meaningful support for an absolute discharge.

[35] Thus, I reject this ground of appeal.

B. WAS THE “SIGNIFICANT THREAT” FINDING UNREASONABLE?

[36] Although it was not abandoned, this ground of appeal was not pressed in oral argument. There was good reason for the tactical decision not to press this ground of appeal before us. In my view, it is patent that when a somewhat probing examination is undertaken, the reasoning process and the outcome arrived at by the ORB reflects a coherent and rational chain of analysis that is fully justified in relation to the constellation of law and facts that is relevant to its decision.

[37] During the reporting period, Mr. Faichney had less stability than in the prior year, when his treatment team developed the plan to reduce his level of support and to transition him to community care through AHT. Significantly, CAMH attempted to move towards that plan, but that effort failed. In her testimony, Dr. Meng stated:

I think in this year in particular, there are two main challenges. One is that because he was discussing this idea of potentially living more independently, we did try to back off on the level of supervision of his medications earlier in the year and the destabilization that that conferred never really fully stabilized until he's since been subject to daily medication supervision by a clinical team. The other aspect is that over this last year his medical health has significantly worsened.

[38] There was clear evidence before the ORB supporting these observations. After Mr. Faichney was given more control over his medication, the levels of Clozapine in his system diminished, at times to the point where the drug, which should have been observed, was undetectable. Those levels fluctuated, despite arrangements made by CAMH to enable him to obtain his injections at a local pharmacy. Dr. Meng concluded that the fluctuation in levels could only be explained by Mr. Faichney's decision not to take the medication.

[39] There was also evidence that Mr. Faichney was not contacting his treatment providers when not taking his medication, he was unreliable with his self-reporting relating to his health, and his willingness to seek care was linked to the fact that he is under external oversight.

[40] There was also clear evidence that when Mr. Faichney's Clozapine levels were low, the symptoms of his mental illness became aggravated. Supported by contemporaneous observations contained in the hospital reports, Dr. Meng testified that "there have been times where he has presented as more paranoid,

more vague and less coherent in his thought process and more guarded and more dismissive”.

[41] Dr. Meng expressed the view that, in these circumstances, “[a]ny course towards more independent living would require a very gradual transition and a lot more support and assessments around that.” Yet there was evidence that, during the reporting period, Mr. Faichney resisted referrals to community care, stating that he did not need higher levels of support, and that on four occasions he refused inpatient hospital admission to stabilize his mental condition.

[42] Dr. Meng also expressed the opinion that Mr. Faichney’s expectations about what he could accomplish in his own community are “unrealistic”. He told his treatment team that he did not want a further relationship with CAMH once discharged and that he “exclusively wanted his care to be provided by a program from his culture.”

[43] Dr. Meng expressed the opinion that, although Mr. Faichney would likely continue to see the AHT team when he felt it necessary, he would continue to have difficulties with medical compliance and stress. She then offered the opinion:

That combination of factors is anticipated to lead to him having more of the kind of symptoms he has historically exhibited over and over again when he’s been unwell, mainly becoming quite paranoid, quite somatically preoccupied, which then worsens his paranoia by worsening his medication compliance and experiencing both persecutory as well as referential delusions and hallucinations, which have led him to feel extremely persecuted, extremely unsafe and has on multiple

occasions in the past, led him to behave in a violent manner.

[44] In concluding based on this evidence that Mr. Faichney continues to represent a significant threat to the safety of the public, the ORB recognized that Mr. Faichney has not acted with serious aggression for many years but attributed his restraint to the effective treatment plan that has been in place. The ORB observed that these psychotic symptoms and the attending aggressive behaviour identified in the evidence are similar to the symptoms he displayed in the past, and to the index offences.

[45] Citing some of the evidence just recounted, the ORB also accepted Dr. Meng's opinion that, absent the support of the treatment team, Mr. Faichney would likely fall away from treatment. On this basis, the ORB concluded that a conditional discharge was a necessary and appropriate disposition.

[46] I would dismiss this ground of appeal.

CONCLUSION

[47] I would therefore dismiss Mr. Faichney's appeal.

Released: April 14, 2022 "J.M.F."

"David M. Paciocco J.A."
"I agree. Fairburn A.C.J.O."
"I agree. E.E. Gillese J.A."